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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAIME GIRALDO
and LUIS FERNANDO GIRALDO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Act permits a district court to make a retroactive and conclusory determination that lengthy delay of a criminal trial, resulting from numerous continuances and missed trial dates, can be excluded from the 70-day trial deadline under the "ends of justice" exclusion.

2. Whether the Speedy Trial Act permits the retroactive exclusion of delay under the "pretrial motions" exclusion, where the court excludes far in excess of the time permitted to be excluded under this Court's decision in *United States v. Henderson*.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jaime Giraldo and Luis Fernando Giraldo ("petitioners") hereby petition for issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Jaime Giraldo, et al.*, Nos. 90-50415 and 90-50420, issued on May 19, 1992.

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A, at 1a-2a, *infra*), the opinion of the court of appeals denying a petition for rehearing and a suggestion for rehearing *en banc* (Pet. App. B, at 3a, *infra*), and the district court decision affirmed by the court of appeals (Pet. App. C, at 4a-6a, *infra*) are unreported.

JURISDICTION

The decision of the court of appeals was issued on May 19, 1992. The court of appeals denied a petition for rehearing and a suggestion for rehearing *en banc* on November 15, 1992.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set out in the Appendix (Pet. App. D, at 7a-10a, *infra*):

18 U.S.C. § 3161(c)(1), (h)(1)(F), (h) (8), (i)
18 U.S.C. § 3162(a)(2)

STATEMENT OF THE CASE

Petitioners were incarcerated without bail for nearly four years beginning in June 1986 while awaiting trial on narcotics-related charges in the United States District Court for the Central District of California. Key witnesses who could have provided exculpatory testimony at trial disappeared during the lengthy pretrial delay, which resulted from numerous continuances.

At the end of this four year period, confronted with petitioners' motion to dismiss the charges for lack of a speedy trial, the district court entered an order containing a *nunc pro tunc* finding that the entire delay was attributable to the competing trial obligations of petitioners' counsel. The court held that the delay was excludable from the 70-day time period within which trial must occur under the "ends of justice" exclusion provided by the Speedy Trial Act, 18 U.S.C. § 3161(h)(8).

While a number of continuances were sought by defense counsel and granted by the district court because of other trial obligations, the court's retroactive finding obscured the fact that,

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[1] By order of this Court (O'Connor, J., Circuit Justice) dated February 17, 1993, the time for filing this petition was extended to and including March 25, 1993.

for long periods of time, the case simply languished as a result of neglect by the government and the district court. Although petitioners' trial was expected to last as little as two days — indeed, perhaps *because* the case was not of great magnitude — long delays occurred several times with no activity in the case and no effort by the prosecutor or the trial judge to move the case to trial.[2]

For example, in January 1988, the court vacated a February 2, 1988, trial date and scheduled a status conference for February 1, 1988, to set a new trial date. The conference never occurred, and no new trial date was set until mid-August, when the court convened a status conference and set trial for October 18, 1988. During the seven-month period from February to August 1988, petitioners' counsel were not involved in any conflicting trials, yet neither the government nor the court made any attempt to bring the case to trial.

Similarly, from mid-March to mid-September 1989, no trial occurred despite the absence of any conflicting trial involvement on the part of petitioners' counsel. During that six-month period, a trial date of May 16, 1989, passed without trial or any record notation or other action by the court. It was not until August 4, 1989, that the government finally filed a motion for a status conference and to set a trial date. The court eventually set trial for November 8, 1989, despite its awareness that petitioners' counsel would by then be in the midst of another trial.

The district court's inattention to the case is also illustrated by four instances in which trial dates came and went without any formal action to continue the trial, resulting in lengthy con-

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[2] Petitioners accept that, for purposes of their appeal, the Speedy Trial "clock" began to run on September 10, 1987, when the district court granted petitioners' motion to withdraw previously entered guilty pleas.

tinuances by default.[3] In some instances, many months would pass after the default continuance before a new trial date was set.[4]

The delay attributable to these periods of inactivity and continuances by default alone amounted to 19 months. Although the trial judge occasionally bemoaned delays in the case, his actions — or inactions — spoke louder than his words. By subsequently blaming defense counsel for all the delays and lumping them indiscriminately under the rubric of the "ends of justice," the court avoided confronting its own lack of management of the case and the government's failure to seek a speedy trial.[5] Indeed, the district court completely abdicated responsibility for making any independent findings regarding excludable delay, and merely adopted verbatim a proposed order drafted by the prosecutor. The court did so despite the prosecutor's prior representations that he "couldn't possibly" construct an order regarding excludable time[6] and his admission that petitioners had "balked at signing off" on his proposed

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[3] These occurred on February 1, 1988; October 18, 1988; May 16, 1989; and May 15, 1990.

[4] After February 1, 1988, no trial date was set until a status conference on August 15, 1988, when trial was set for October 19, 1988. Following the October 18, 1988, default continuance, the court set no new trial date until December 8, 1988, when it approved a stipulation of counsel retroactively continuing the trial to February 28, 1989. In the wake of the May 16, 1989, default, the court waited until a September 11, 1989, status conference to set a trial date of November 8, 1989. Following the May 15, 1989, default continuance three more days passed before petitioners filed a motion to dismiss under the Speedy Trial Act. The delays from these default continuances total approximately 19 months.

[5] The order additionally found a substantial portion of the delay excludable under the "pretrial motions" exclusion of the Speedy Trial Act. As discussed *infra* at 18-20, this finding also is clearly erroneous.

[6] Tr., Nov. 3, 1989, at 7; *see also* Tr., Fed 28, 1989, at 6.

stipulation of facts "regarding the delays in this case." Transcript of Hearing ["Tr."], Apr. 17, 1990, at 6.

Such indifference on the part of the district court and the prosecutor toward maintaining a careful record of the delays is manifest at other points on the record. For example, at a status conference on February 28, 1989, the prosecutor stated that he had "lost track — and I don't think I can reconstruct it out of my own records — [of] any sense of the Speedy Trial Act." Tr., Feb. 28, 1989, at 6. At a subsequent status conference on November 3, 1989, the court, referring to prior delays, stated: "Okay. I suppose there's some excludable time that could be found for all this. It's going to be pressing it to the limit." Tr., Nov. 3, 1989, at 7. The prosecutor replied that he "couldn't possibly" construct an order regarding excludable time "at this point." *Id.*

Even when continuances were sought by counsel, the district court entered no orders regarding excludable time. At some status conferences, the district court, apparently recognizing its statutory obligation to enter such an order, delegated the task of drafting one to the prosecutor or defense counsel.[7] The attorneys produced no such draft orders, and the district court never followed up the requests or produced the orders itself. At other status conferences,[8] the district court simply granted a requested continuances without even referring to the Speedy Trial Act. On two occasions,[9] the court simply approved a stipulation by the parties continuing the trial. The stipulations stated no grounds for the delay, and the court accepted the

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[7] September 10, 1987; November 30, 1987; February 28, 1989; and November 3, 1989. The November 30, 1987, continuance apparently was granted to accommodate the government. (This detail, like all others, was swept aside in the court's retroactive order regarding excludable time.)

[8] August 15, 1988; September 11, 1989; February 14, 1990; and April 17, 1990.

[9] December 8, 1988; and April 7, 1989.

stipulations without holding any status conference or making any independent inquiry.

The district court never sought the consent of the defendants to any of the continuances. In response to petitioners' motion to dismiss on Speedy Trial Act grounds, the court revealed its belief that no such affirmative inquiry was needed, and that, instead, the burden rested with petitioners: "They didn't raise it with me, and the only meaningful way that they could have raised it with me is to step up here to the lectern, which they've never done in the last couple of years — they have sat always right there — and come up to the lectern and say, 'I've got to have another lawyer because I want to go to trial.' And they never did that." Tr. May 21, 1990, p. 18.

Even this statement was an overgeneralization, because on November 3, 1989, petitioners, through new counsel, *had* raised their concern about the delay with the prosecutor. *See* Appellee's Brief, *United States v. Giraldo*, Nos. 90-50415 and 90-50420, at 10-11 & n.8 (9th Cir. filed May 20, 1991). The prosecutor did not alert the court to this communication, and further delays ensued. On May 18, 1990, petitioners, represented by new counsel, filed a motion to dismiss the indictment because of a lack of a speedy trial. The government filed its opposition on May 21, 1990, and the court held a hearing that same day. At the hearing, petitioners' new counsel supplemented the motion with an oral proffer specifically identifying by name three material defense witnesses who were no longer available because of the delay, and the exculpatory facts to which they would have testified. Tr., May 21, 1990, at 7-10.

The district court denied the speedy trial motion at the hearing. Deprived of a meaningful trial, petitioners thereafter accepted a plea of guilty on several of the charges, while expressly reserving their right to appeal the speedy trial issue. The court of appeals affirmed the district court's judgment in a

unpublished memorandum opinion. Petitioners have remained in custody throughout their appeal.

ARGUMENT

I. A UNIFORM INTERPRETATION OF THE SPEEDY TRIAL ACT'S "ENDS OF JUSTICE" EXCLUSION IS NEEDED TO ENSURE THAT THE LANGUAGE AND PURPOSE OF THE ACT ARE NOT THWARTED BY RETROACTIVE FINDINGS UNDER THAT EXCLUSION.

This case reveals the need for a uniform interpretation of the Speedy Trial Act's "ends of justice" exclusion. While numerous appellate decisions have addressed, with different results, the question whether the Act permits retroactive findings of excludable delay, this Court has never spoken on the issue. *See Williford v. United States*, 469 U.S. 893, 893 (1984) (White, J., dissenting from denial of certiorari) ("Congress intended the Speedy Trial Act to provide a uniform national rule regarding trial scheduling and delay."). This Court should review this case in order to make clear that the Act does not sanction the procedures adopted by the district court. Such devices inevitably undercut the right to a speedy trial vouchsafed by the Act to both the accused and the public, and thereby erode the integrity of the federal criminal justice system.

A. "Ends of Justice" Findings Must be Made Before a Continuance is Granted.

The Speedy Trial Act excludes from the time within which a trial must commence "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government," if two requirements are satisfied. 18 U.S.C. § 3161(h)(8)(A). First, the judge must grant the continuance "on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the

public and the defendant in a speedy trial." *Id.* Second, the delay is not excludable "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id.*

The Act's requirement that a continuance be granted only "on the basis of" a specific finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" allows only one logical construction: to be the "basis" for a ruling, the finding must have already been made. Thus, the statute requires the finding to *precede* the continuance and to address the specific circumstances surrounding that particular continuance. Moreover, delay can be excluded only when it results from a continuance *granted* by the district court. Where, as here, substantial delay occurred because the district court simply ignored trial dates and let months pass without setting a new date, no continuance was "granted" in the plain meaning of the statute.

Although the language of the provision is a "clear expression of Congressional intent" and renders unnecessary a resort to the legislative history, the legislative history nonetheless "is wholly consistent with" that language. *United States v. Rojas-Contreras*, 474 U.S. 231, 235 (1985). The House Report states: "*Before* deciding the question of whether a continuance should be granted, the court *must* determine whether the ends of justice served by granting the continuance would outweigh the best interest of the public and the defendant in a speedy trial." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess., at 22 (1974) (emphasis added); *see, e.g.*, *United States v. Saltzman*, 1993 WL 9782, *2 (10th Cir. 1993) ("Congress intended that the decision should be prospective, not retroactive."); *United States v. Tunnessen*, 763 F.2d 74, 77 (2d Cir. 1985)(finding congressional intent that

"ends of justice" determination be made "at the outset of the excludable period").

Requiring a specific "ends of justice" finding prior to the granting of a continuance effectuates Congress' specific intent "that continuances under 3161(h)(8) should be given only in unusual cases" and that the "ends of justice" exclusion "should be rarely used."[10] The statute expressly forbids exclusions of delay resulting, for example, merely from "general congestion of the court's calendar or lack of diligent preparation" by the Government. 18 U.S.C. § 3161(h)(8)(C). Permitting *nunc pro tunc* findings invites inappropriate reliance on the "ends of justice" exclusion for delays that result from pure neglect by the court and government.[11] Such abuses can be obscured by the kind of conclusory findings made by the district court in this case.

The requirement that the court make its ends-of-justice determination before granting a continuance is no mere procedural nicety but rather implements the fundamental congressional purposes in passing the Speedy Trial Act. Congress recognized that "delay has become an integral part of criminal justice administration. Judges, prosecutors, and defense coun-

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[10] H.R. Rep. No. 93-1508, 932 Cong., 2d Sess. at 39, 41 (1974). The House Report elaborated on the limited application of the exclusion (*id.* at 22):

> Motions would be appropriate under this exclusion when the continuation of the proceeding would be made impossible or result in a miscarriage of justice; where the case as a whole is unusual or complex, due to the number of defendants or the nature of the prosecution and it is unreasonable to expect adequate preparation within the time periods; and where the factual determination before a grand jury is complex.

[11] As Judge Posner remarked of a district court's effort to make "nunc pro tunc" findings in another context, "Latin is a wonderful language but it is not properly used to destroy people's legal rights." *Herzog Constr. Corp. v. McGowen Corp.*, 976 F.2d 1062, 1066 (7th Cir. 1992).

sel in many jurisdictions have come to depend upon delay to cope with their workloads." S. Rep. No. 93-1021, 93d Cong., 2d Sess., at 9 (1974) (emphasis added). Moreover, "[d]efense counsel often blame delay on the prosecutors — prosecutors may blame the courts and defense counsel — and the judges often blame both sides." *Id.* at 8-9. Thus, "[u]ntil speedy trial is statutorily mandated . . . many participants in the criminal justice process will not — and probably cannot — discipline themselves" to end both the delays and the consequent "litany of blame." *Id.* at 9.

Congress therefore enacted a set of "stringent time limitations" for the commencement of trial. *Foucha v. Louisiana*, ___ U.S. ___, 112 S. Ct. 1780 (1992)(quoting *United States v. Salerno*, 481 U.S. 739, 747 (1987)). Congress squarely placed the burden of compliance with these limits on the government and the courts,[12] with dismissal of the case as the penalty for noncompliance. 18 U.S.C. § 3162. While the Act's "excludable time" provisions recognize that its stringent time limits are not always feasible, the exclusions clearly were not intended to swallow up the limits themselves.[13]

A retroactive "ends of justice" finding effectively nullifies the statutory sanction for neglect, and relieves the court and the government of any real responsibility for bringing a case to trial.

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[12] *United States v. Doran*, 882 F.2d 1511, 1517 (10th Cir. 1989)(responsibility of ensuring compliance with the Act is one "the courts share with the government") *accord United States v. Saltzman*, 1993 WL 9782, *3 (10th Cir. 1993); *United States v. Tunnessen*, 763 F.2d 74, 79 (2d Cir. 1985).

[13] Congress' expressed concern about delay arose before pretrial detention without bail under the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.* Where an accused is held without bail, as occurred in this case, delay is an even greater deprivation of rights. *See Foucha v. Louisiana*, ___ U.S. ___, 112 S. Ct. 1780, 1785 (1992)("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987))).

It also obscures a district court's failure to deal with defense and government counsel's inevitable tendency to postpone trial. Finally, it invites attempts by the prosecution and the court to lay responsibility for the delay of the trial entirely at the feet of defense counsel and thus engage in the very "litany of blame" that Congress sought to end. *Cf. Doggett v. United States*, 505 U.S. ___, 112 S. Ct. 2686, 2693-94 (1992) ("The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.").

With the apparent exception of the Ninth Circuit's decision below, a consensus has emerged among the Courts of Appeals that the trial court must make a specific finding that the "ends of justice" warrant a continuance *before* it is granted.[14] The Courts of Appeals have rejected findings made *nunc pro tunc*. *E.g.*, *United States v. Doran*, 882 F.2d 1511 (10th Cir. 1989); *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985); *United States v. Richmond*, 735 F.2d 208 (6th Cir. 1984). Prior Ninth Circuit decisions, while not entirely clear, had suggested agreement with these other decisions.[15]

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[14] *See United States v. Saltzman*, 1993 WL 9782 (10th Cir. 1993); *United States v. Crawford*, 982 F.2d 199 (6th Cir. 1993); *United States v. Lattany*, 982 F.2d 866 (3d Cir. 1992); *United States v. Tanner*, 941 F.2d 574 (7th Cir. 1991), *cert. denied*, ___ U.S.____, 112 S. Ct. 1190 (1992); *United States v. Davenport*, 935 F.2d 1223 (11th Cir. 1991); *United States v. Long*, 900 F.2d 1270, 1276 (8th Cir. 1990); *United States v. Noone*, 913 F.2d 20 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1686 (1991); *United States v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985); *United States v. Carey*, 746 F.2d 228 (4th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *United States v. Edwards*, 627 F.2d 460 (D.C. Cir.), *cert. denied*, 449 U.S. 872 (1980).

[15] *See United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990); *United States v. Perez-Revelas*, 715 F.2d 1348, 1351 & n. 3 (9th Cir. 1983).

This case demonstrates just how far the district courts may stray from the manifest statutory prohibition of retroactive findings under the "ends of justice" exclusion. The district court deemed the statutory requirements met by a single, sweeping finding regarding the cause of numerous delays occurring long before, a finding adopted unchanged from the prosecutor's draft despite the prosecutor's prior express disclaimers as to its reliability. *See supra* at 4. The order effectively wipes out the 19 months of delay resulting from repeatedly missed trial dates and the court's failure to set a trial date throughout the spring and summer of 1988 and 1989. *Cf. Doggett v. United States*, ___ U.S. ___, 112 S. Ct. 2686, 2691 n. 1 (1992)("[T]he lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). By the device of retroactive, conclusory "ends of justice" findings, the district court swept 19 months of neglect under the rug. *See Doggett*, 112 S. Ct. at 2693 ("[O]ur tolerance for such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial.").

The district court's erroneous belief that petitioners acquiesced in all the delays, even were it correct, would not excuse the lack of contemporaneous "ends of justice" findings. It is well settled that "provisions of the Speedy Trial Act cannot be waived by a defendant acting unilaterally because it would compromise the public interest in speedy justice."[16]

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[16] *Saltzman*, 1993 WL at *2; *accord, e.g., United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992); *United States v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *United States v. Pringle*, 751 F.2d 419, 433-434 (1st Cir. 1984); *see* S. Rep. No. 96-212, 96th Cong., 1st Sess. 29 (1979) ("[A]ny construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendants . . . is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial."); Administrative

As Congress expressly recognized, "[o]nly very rarely is it in the defendant's interest to seek speedy trial, for in most cases it is the last thing he wants. Most defendants realize that delay inures to their benefit . . . ." S. Rep. No. 93-1021, 93d Cong., 2d Sess., at 14 (1974); *accord Barker v. Wingo*, 407 U.S. 514, 521 (1972)("Delay is not an uncommon defense tactic."); *see Tunnessen*, 763 F.2d at 79 ("[T]he defendants ha[ve] no obligation to take affirmative steps to insure that they would be tried in a timely manner."). Accordingly, "an attempted 'waiver' by the Defendant is necessarily invalid unless the court simultaneously makes 'ends of justice' findings." *Saltzman*, 1993 WL at *3; *accord, e.g., United States v. Carrasquillo*, 667 F.2d 392, 390 (3d Cir. 1981).

The most recent statistics compiled by the Administrative Office of the United States Courts show a disturbing upward trend in the time from indictment to disposition in federal criminal cases during the five years ending in 1991. In 1986, the national median was 3.9 months. By 1991, it had increased to 5.7 months. Administrative Office of the United States Courts, 1991 Federal Court Management Statistics 167 (1991). By comparison, Congress was moved to enact the Speedy Trial Act at a time when the national median was 3.4 months. *Speedy Trial: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 294 (1977) (reprinting excerpts of Annual Report of the Administrative Office of the U.S. Courts (1972)).

Procedural shortcuts that effectively relieve the government of its burden of securing a speedy trial, such as the use of retroactive findings under the "ends of justice" exclusion, will only exacerbate this trend toward longer delays. These increasing delays in the processing of criminal cases erode public

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Office of the United States Courts, Amended Speedy Trial Act Guidelines 62 (1984) ("The fact that the defendant has requested the continuance or consents to it is not in itself sufficient to toll the operation of the time limits.").

confidence in the criminal justice system. At a time when a national debate rages over the effectiveness of that system, this Court should consider issues such as those raised in this case to ensure against judicial dilution of the public's and the accused's right to a speedy trial.

B. The Trial Court Must Make a Record of the "Ends of Justice" Findings at the Time the Findings are Made.

While the appellate decisions, except for the decision below, have uniformly held that the district court must make a specific finding that a continuance is warranted by the "ends of justice" before granting the continuance, the circuit courts have varied in determining the precise temporal relationship between the making of the required *findings* and the making of the *record* of those findings. Review of this case is necessary to clarify this important issue.

1. The array of appellate approaches.

At least one appellate decision appears to endorse the notion that the trial court should make the record of the "ends of justice" findings contemporaneously with making the findings, and before granting the continuance. *United States v. Ortega-Mena*, 949 F.2d 156, 159 (5th Cir. 1991), ("The lack of a contemporaneous record . . . troubles us . . . ."); *see also United States v. Saltzman*, 1993 WL 9782, *2 (10th Cir. 1993); *United States v. Davenport*, 935 F.2d 1223, 1229 (11th Cir. 1991); *United States v. Long*, 900 F.2d 1270, 1276 (8th Cir. 1990).

Some circuits have stated that it is "recommended," but not mandatory, that the findings be placed on the record at the time a continuance is granted. *E.g.*, *United States v. Lattany*, 982 F.2d 866, 876 n. 14 (3d Cir. 1992); *United States v. Tunnessen*, 763 F.2d 74, 78-79 (2d Cir. 1985); *United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981).

Other circuits hold that the record of the "ends of justice" finding must be made at least within the time limit specified by the Act for trial. *E.g.*, *United States v. Tanner*, 941 F.2d 574, 583 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1190 (1992); *United States v. Janik*, 723 F.2d 537 (7th Cir. 1983).

Most appellate courts also require that, at the time the findings are made, the trial court at least state on the record that a continuance is being granted pursuant to the "ends of justice" prong of the Act. In the Second Circuit's formulation:

> A prospective statement that time will be excluded based on the ends of justice serves to assure the reviewing court that the required balancing was done at the outset. Moreover, it puts defense counsel on notice that the speedy trial clock has been stopped. If for any reason counsel believes that this is inappropriate, an objection may be raised and a record made at that time.

United States v. Tunnessen, 763 F.2d 74, 78-79 (2d Cir. 1985) (quoting *United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981)); *see, e.g.*, *United States v. Brenna*, 878 F.2d 117, 122 (3d Cir. 1989); *United States v. Doran*, 882 F.2d 1511, 1515 (10th Cir. 1989); *United States v. Lewis*, 759 F.2d 1316, 1351-52 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

In an alternative formulation, some circuits hold that, while detailed findings need not be recorded at the time they are made, there must be "sufficient evidence" that a specific finding did, indeed, precede the granting of the continuance.[17] *E.g.*, *United States v. Vasser*, 916 F.2d 624, 627 (11th Cir. 1990) *cert. denied*,

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[17] The standard excludable delay form developed by the Administrative Office of the United States Court, while a manifestly inadequate vehicle for the ultimate recitation of the specific findings required by the Act, may serve as the "sufficient evidence" of the finding or the "prospective statement" contemplated in *Tunnessen*. In this case, the district court used that form only once, following its denial of the motion to dismiss under the Speedy Trial Act. *See* Pet. App. E, at 11a-12a, *infra*.

___ U.S. ___, 111 S. Ct. 1688 (1991); *United States v. Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989); *United States v. Elkins*, 795 F.2d 919, 924 (11th Cir.), *cert. denied*, 479 U.S. 952 (1986).

In this and earlier cases, the Ninth Circuit has been at the extreme in permitting retroactive recording of findings, without even requiring a contemporaneous "prospective statement" of findings or "sufficient evidence" of contemporaneous findings. *See United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990).

2. The Act should be construed to require contemporaneous recordmaking.

Only one rule is truly consistent with the underlying aim of the Speedy Trial Act to effect clear, bright-line standards by which to judge claims of violations of speedy trial rights, namely a requirement that the record of findings be made at the time a continuance is granted. Moreover, only by requiring contemporaneously recorded findings will this Court safeguard Congress' intent that the "ends of justice" exclusion be used rarely, and not as a catch-all for exclusions otherwise unjustified under the Act.

The "ends of justice" provision states that delay resulting from a continuance is not excludable "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). To be sure, that provision does not expressly indicate whether this step should precede the granting of the continuance. The legislative history is similarly vague: "Furthermore the judge must set out in writing his reasons for believing that in granting the continuance he strikes the proper balance between these two societal interests."[18]

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[18] S. Rep. No. 93-1021, 93d Congress, 2d Sess. at 39 (1974); *accord* H. Rep. No. 93-1508 93d Cong., 2d Sess. at 22 ("The Court is required to note in the record the reasons for granting such a continuance.").

Absent any statement in the record-making clause permitting the deferral of this task, however, the clause should be construed consistently with the "findings" clause. Indeed, the very distinction between the making of findings and the making of a record of findings that underlies the majority rule is artificial and illogical. Plainly, Congress intended the two provisions to work together to ensure that the "ends of justice" exclusion not be abused. *See supra* at __.

To permit the trial courts to make their record of "ends of justice" findings long after granting a continuance substantially undercuts the protection afforded by the clear requirement that the findings themselves be made before the continuance is granted. The purpose of requiring findings of any type to be put on the record is to ensure that the trial court's determination was based on legitimate factors. *See United States v. Ortega-Mena*, 949 F.2d 156, 159 (5th Cir. 1991) (lack of a contemporaneous record regarding the reasons for a continuance is troubling because it prevents appellate "inquiry into whether the court's ruling rested on the Act's permissible factors."); *cf. United States v. Taylor*, 487 U.S. 326 (1988)(reversing Speedy Trial Act determination because of lack of adequate explanation by trial court on the record). The legislative intent is defeated where the court can create the record of its determination months or years after the factors were required to be considered.

* * *

Last Term, in *Doggett v. United States*, ___ U.S. ___, 112 S. Ct. 2686 (1992), this Court addressed the boundaries of the constitutional right to a speedy trial. While separate, the statutory right to a speedy trial that is vested in both the accused and the public is no less vital to "the fairness of the entire system." *Doggett*, 112 S. Ct. at 2692. A clear and uniform construction of the Act is needed to ensure that its critical objectives are not defeated by the retroactive invocation of the "ends of justice" exclusion. At the same time, the constitutional

dimension of this case should not be minimized. Because the purpose of the Act was to "make effective the sixth amendment right to a speedy trial,"[19] dilution of the statutory provisions also erodes the underlying constitutional guarantee.

II. THE LOWER COURTS' EXCLUSION OF SUBSTANTIAL TIME FOR PRETRIAL MOTIONS IS ERRONEOUS AND SHOULD NOT LIMIT REVIEW OF THIS CASE.

The Court of Appeals affirmed the convictions on the alternative ground that the delay from November 2, 1987, to May 21, 1990, was excludable under the "pretrial motions" prong of the Act, 18 U.S.C. § 3161(h)(1)(F), as well as the "ends of justice" prong. Review by this Court of this independent ground of affirmance is necessary to the ultimate granting of relief to petitioners.[20]

The Ninth Circuit's decision appears to rest on the district court's finding that the entire period of time from November 2, 1987, to the filing of the motion to dismiss was excludable under § 3161(h)(1)(F) of the Speedy Trial Act, which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt

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[19] S. Rep. No. 95-1021, 93d Cong., 2d Sess. at 1 (1974).

[20] Petitioners seek dismissal of the indictment pursuant to 18 U.S.C. § 3162(a)(2). Such relief presumably could not be granted unless both alternative grounds of affirmance of the district court's order were reviewed and rejected by this Court.

Pursuant to the Speedy Trial Act, dismissal may be with or without prejudice, depending on factors to be considered by the district court. *Id.* The district court did not reach this issue in its order. In this case, however, further consideration of this issue would be bootless, as the statute of limitations on any reprosecution has long run. *See* 18 U.S.C. § 3282 (five-year statute of limitations); *United States v. Taylor*, 487 U.S. 326, 342 (1988)(retrial under the dismissal provisions of Speedy Trial Act is subject to statute of limitations).

disposition of, such motion." The order asserts that the motion to dismiss for police misconduct filed on January 4, 1988, was never resolved by the court.

The validity of this finding, which again was adopted verbatim from the government's proposed order, was called into question by the district court itself. In completing the standard "excludable delay" form, the district court cited only the "ends of justice" exclusion for the delays in the case and made no mention of the "pretrial motions" ground.[21]

But regardless whether the police misconduct motion ultimately was resolved, the exclusion of the entire time from its filing to the end of the case was clearly erroneous. In *United States v. Henderson*, 476 U.S. 321 (1986), this Court, clarifying the "pretrial motion" exclusion, held that where a hearing is not required for a motion, the maximum amount of excludable delay attributable to a pretrial motion is 30 days from the date of the last submission by either party. *Id.* at 329. There is no dispute

[21] Pet. App. E, at 11a-12a, *infra*. The excludable delay form comports with the record. On August 15, 1988, the prosecutor suggested that the motion to dismiss for police misconduct remained open. He admitted, "but for that we would be in a difficult position vis-a-vis the Speedy Trial Act." Tr., Aug. 15, 1988, at 7. The court stated that the motion had been denied "a long time ago," but invited the government to submit a memorandum showing otherwise. *Id.* at 7-8. The government never submitted such a memorandum, and the prosecutor subsequently submitted a sworn declaration stating that the motion to dismiss for police misconduct "was denied." Declaration of James P. Walsh, Jr., in Support of Motion for Status Conference and to Set a Trial Date, ¶ 2 (filed Aug. 4, 1989). While the government again suggested that the motion was pending at the hearing on petitioners' speedy trial motion, the district court stated, "That's not your best argument," because the motion already had been denied. Tr., May 21, 1990, at 25-26. Had petitioners been given to understand that the motion was, indeed, pending at that time, they would have had the opportunity to press for a ruling. The district court's subsequent acceptance of the government's contention effectively "sandbagged" petitioners.

in this case that the last relevant submission was the government's final brief, filed on March 7, 1988.[22]

Based on the government's own position before the district court, a hearing was not required to resolve the motion to dismiss for police misconduct, and, indeed, one was never held.[23] The appropriate period of excludable delay resulting from the motion therefore began on January 4, 1988 (the date of filing) and ended April 7, 1988 (30 days after the last submission). The lower courts' reliance on the "pretrial motions" exclusion for the entire delay between January 4, 1988, and May 21, 1990, is clearly erroneous and contrary to law.

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[22] Petitioners filed their final submission on February 22, 1988.

[23] In their motion to dismiss based on police misconduct, petitioners had requested a hearing at which police witnesses would appear under subpoena. Petitioners' motion was supported by an unsworn declaration by counsel stating his belief that the misconduct had occurred. The government moved to quash the hearing and the subpoenas, on the ground that the declaration failed to raise a factual issue requiring an evidentiary hearing.

On February 22, 1988, the court heard argument from both sides on their respective motions, but no witness testified. The court then scheduled another "date for appearing" on March 16, 1988, without indicating the precise purpose of that proceeding. Tr., Feb. 22, 1988, at 19. For reasons not appearing in the record, the "date for appearing" passed without any proceeding occurring, and the court neither scheduled nor held any further hearings on the motion. The government's opposition to the hearing may have been the basis for the court's declining to hold one.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions raised in this petition.

Respectfully submitted,

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* *Counsel of Record*

Date: March 25, 1993

APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAIME GIRALDO,
LUIS FERNANDO GIRALDO,
Defendants-Appellants.

Nos. 90-50415 and 90-50420
D.C. No. CR-86-566-RG

Filed May 19, 1992
Cathy A. Catterson
Clerk, U.S. Court of Appeals

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding

MEMORANDUM*

Submitted November 5, 1991**
Pasadena, California

Before: FARRIS, PREGERSON, and THOMPSON, Circuit Judges.

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* This deposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Jaime Giraldo and Luis Fernando Giraldo appeal their convictions for narcotics-related offenses. Defendants argue that the district court improperly denied their joint motion to dismiss for the alleged violation of their respective constitutional and statutory rights to a speedy trial. We have jurisdiction pursuant to 28 U.S.C. 1291. We affirm.

Under the Speedy Trial Act, a defendant must be tried within seventy days from the date of indictment. 18 U.S.C. § 3161(c)(1). However, delays attributable to defense counsel's requests for continuances and to the pendency of pre-trial motions are excluded from the seventy-day limit. 18 U.S.C. §§ 3161(h)(1)(F) and 3161(h)(8)(A); *Henderson v. United States*, 476 U.S. 321 (1986). The record shows that the delays Defendants allege to be nonexcludable were caused primarily by defense counsel's numerous requests for continuances. *See* Reporter's Transcripts of Status Conferences held on September 28 and November 30, 1987, August 15, 1988, February 28 and November 3, 1989, February 14, 1990 and April 17, 1990. The remaining delay was due to then pending pretrial motions. *See* Docket Sheets, D.C. No. 86-566-RG.

In short, the overwhelming cause of the delay in this case was the Defendants themselves. We therefore likewise conclude that the Defendants' Sixth Amendment and statutory rights to speedy trial were not violated.

The district court's judgment is AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAIME GIRALDO,
LUIS FERNANDO GIRALDO,
Defendants-Appellants.

Nos. 90 50415 and 90 50420
D.C. No. 86-566-RG

Filed Nov. 25, 1992
Cathy A. Catterson,
Clerk, U.S. Court of Appeals

ORDER

Before: FARRIS, PREGERSON, and THOMPSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAIME GIRALDO, ET AL.,

Defendant.

No. CR 86-566-RG

FINDINGS AND ORDER RE: EXCLUDABLE TIME UNDER SPEEDY TRIAL ACT

The court, being fully familiar with the circumstances presented by this case, makes the following factual findings and order:

1. Following extensive pretrial hearings in this case defendants JAIME GIRALDO and LUIS FERNANDO GIRALDO each entered pleas of guilty to Counts 1 and 2 of the indictment.

2. Following several continuances of the sentencing hearing each defendant moved to withdraw his guilty plea, and those motions were granted on September 10, 1987. The case was successively set for trial on December 8 and December 21, 1987 and on February 2, 1988. From August 12, 1987 until January 4, 1988 a defense discovery motion was pending decision. That motion was denied on January 4, 1988.

3. Defendants jointly filed a motion to dismiss the indictment for prosecutorial misconduct on January 4, 1988. That motion, together with a motion filed by the government to quash

certain subpoenas issued in connection with a requested evidentiary hearing on defendants' motion to dismiss, remains pending. *See*, 18 U.S.C. § 3161(h)(1)(F).

4. From March, 1988 until December 14, 1988 David E. Kenner, counsel for JAIME GIRALDO, was involved substantially full-time in representing defendant Barry Minkow in complex litigation, including a lengthy trial in that case, *United States v. Minkow*, CR 88-22-DT. Following shortly after the conclusion of that case Mr. Kenner was involved in representing the defendant in a case entitled *United States v. Rosten*, CR 88-162-JMI, a case which consumed a substantial amount of his professional capacity. Mr. Kenner's involvement in that case, including trial, overlapped his representation in the *Minkow* case, running from a first appearance in April, 1988 through the conclusion of a trial which occupied the period February 28 - March 15, 1989. The *Rosten* trial was followed almost immediately by extensive involvement in a case entitled *United States v. Mario Villabona, et al.*, CR 88-972-WJR. Mr. Kenner's involvement in that case has been extremely time consuming, with 10 weeks devoted to hearings on motions and a several-months long trial currently underway. Anthony Brooklier, counsel for defendant LUIS FERNANDO GIRALDO, was for a significant period, fully involved in the *Villabona* case as well.

5. Defendants JAIMES [sic] GIRALDO and LUIS FERNANDO GIRALDO have been present in court on several occasions when continuances of the trial date have been discussed and have at no time stated or otherwise inicated [sic] that they wished to obtain other counsel in order to proceed to trial. Neither defendant has in any way indicated a desire to have his case severed in order to proceed to trial. Neither defendant has in any way indicated that he was unhappy with his counsel's representation or that he wished, for any reason, to proced [sic] to trial at a particular time.

6. The period from September 10, 1987 to and including May 22, 1990 is excludable from the time within which trial is required to be commenced under the Speedy Trial Act due to the pendency of pretrial motions. 18 U.S.C. 3161(h)(1)(F). Further, the period from September 10, 1987 to May 22, 1990 is part of a period of time within which it would not have been reasonable for the court to have required defendants to proceed to trial because their cases were joined for trial and counsel for JAIME GIRALDO has been continuously engaged in representing clients in a way which did not permit him to effectively prepare for trial, taking into account the exercise of due diligence. Therefore, that period of time is excludable from Speedy Trial Act computations pursuant to 18 U.S.C. 3161(h)(8)(A). The ends of justice served by the granting of successive continuances during the period of September 10, 1987 to May 22, 1990 outweighs the interests of the public and the defendants in a speedy trial. That finding of good cause is based upon the need for continuity of counsel and the fact that the case, while not unusually complex, nevertheless requires a sufficient period for counsel to prepare for trial, and denial of that time for preparation would be likely to produce a miscarriage of justice.

IT IS THEREFORE ORDERED that the time from September 10, 1987 to May 22, 1990 is excluded from calculating the time within which trial must commence in this case under the provisions of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*

Dated: 5-22-90

/s/ Richard A. Gadbois, Jr.
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses to his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 3161

§ 3161. Time limits and exclusions

. . .

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

. . .

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —

. . .

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

. . .

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial

proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

. . .

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

. . .

§ 3162. Sanctions

(a) (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section

3161(h), the information or indictment shall be dismissed on *motion of the defendant. The defendant shall have the burden* of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

BEST AVAILABLE COPY

CENTRAL DISTRICT OF CALIFOR 'A

United States v. Jaime Giraldo
Defendant

Case No. CR-86-566-RG.

Presiding Richard A. Gadbois, Jr.
Judge

Excludable Time
Begin Sept 10 1987
End May 22 1990

Appearances
For U.S. James Walsh AUSA
For Defense David Kenner

# of days excluded 2yrs./8mos/12 days

A	Examination of Defendant 3161(h)(1) (1) Physical ☐ (2) Mental. ☐	☐	
B	NARA Procedural Delay 3161 (h) (1)	☐	
5	Deferral of Prosecution under 28USC2902	☐	
C	Trial State or (other charges)	☐	
D	Interlocutory Appeal	☐	
E	Pretrial Motions (from filing to hearing or other prompt disposition)	☐	
F	Transfer from other districts (FRCrP, 20, 21, & 40)	☐	
6	Transportation from another district or to/from examination or hospitalization in 10 days or less	☐	
7	Consideration by court of proposed plea agreement	☐	
G	Proceeding under advisement not to exceed 30 days	☐	
H	Miscellaneous Proceedings; Probation, Deportation, Extradition	☐	
I	Defered Prosecution by Mutual Agreement 3161 (h)(2)	☐	
M	Unavailability of: 3161(h)(3) (1) Defendant (2) Govt. Witness Defense Witness	☐ ☐ ☐	
N	Defendant cannot be tried: 3161(h)(4) Physical Disability Mental Disability	☐ ☐	
O	Defendant under NARA Treatment Purs 3161 (h)(5)	☐	
P	Superseding Indictment and/or New Charges Purs 3161(h)(6)	☐	
R	Defendant Awaiting Trial of Co-Defendant when no severance has been granted 3161 (h)(7)	☐	
T	Ends of Justice 3161 (h)(8) Use "T" alone if more than one of reasons below are given in support of continuance.		
T1	Failure to continue would stop further proceedings or result in miscarriage of justice	☐	
T2	Case unusual or complex	☐	
T3	Indictment following arrest cannot be filed in 30 days	☐	
T4	Continuance granted in order to obtain or substitute counsel, or give reasonable time to prepare	☐	
	Other (see over)	☐	
U	Withdrawal of Guilty Plea Purs 3161 (i)	☐	
W	Grand Jury Indictment Time Extended	☐	

ENTERED ON COURT
MAY 29 1990

5-22-90
DATE

D. Stowell ER-53
Courtroom Deputy

212

CR-37 (Rev. 10/81) EXCLUDABLE DELAY FORM

APPENDIX E 11a

CENTRAL DISTRICT OF CALIFORNIA

United States v. Luis Fernando Giraldo — Defendant — Case No. CR-88-566-KG

Presiding Judge: Richard A. Gadbois, Jr.

Excludable Time
Begin Sept 10 1987
End May 22 1990

Appearances
For U.S. James Walsh AUSA
For Defense Anthony Brooklier

# of days excluded 2yrs./8 mos./12 days

A	Examination of Defendant 3161(h)(1) (1) Physical ☐ (2) Mental ☐	O	Defendant under NARA Treatment Purs 3161 (h)(5) ☐
B	NARA ☐ Procedural Delay 3161 (h) (1)	P	Superseding Indictment and/or New Charges Purs 3161(h)(6) ☐
5	Deferral of Prosecution under 28USC2902 ☐	R	Defendant Awaiting Trial of Co-Defendant when no severance has been granted 3161 (h)(7) ☐
C	Trial State or (other charges) ☐	T	Ends of Justice 3161 (h)(8) Use "T" alone if more than one of reasons below are given in support of continuance.
D	Interlocutory Appeal ☐	T1	Failure to continue would stop further proceedings or result in miscarriage of justice ☐
E	Pretrial Motions (from filing to hearing or other prompt disposition) ☐	T2	Case unusual or complex ☐
F	Transfer from other districts (FRCrP, 20, 21, & 40) ☐	T3	Indictment following arrest cannot be filed in 30 days ☐
6	Transportation from another district or to/from examination or hospitalization in 10 days or less ☐	T4	Continuance granted in order to obtain or substitute counsel, or give reasonable time to prepare ☐
7	Consideration by court of proposed agreement ☐		Other (see over) ☐
G	Proceeding under advisement not to exceed 30 days ☐	U	Withdrawal of Guilty Plea Purs 3161 (i) ☐
H	Miscellaneous Proceedings; Probation, Deportation, Extradition ☐	W	Grand Jury Indictment Time Extended ☐
I	Defered Prosecution by Mutual Agreement 3161 (h)(2) ☐		
M	Unavailability of: 3161(h)(3) (1) Defendant ☐ (2) Govt. Witness ☐ Defense Witness ☐		
N	Defendant cannot be tried: 3161(h)(4) Physical Disability ☐ Mental Disability ☐		

ENTERED ON COURT
MAY 29 1990

5-22-90
DATE

Courtroom Deputy

CR-37 (Rev. 10/81) EXCLUDABLE DELAY FORM

ER-54

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12a

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Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

No. 92-1552

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAIME GIRALDO AND LUIS FERNANDO GIRALDO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the delay before petitioners' trial violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished but the judgment is noted at 963 F.2d 380 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1992. A petition for rehearing was denied on November 25, 1992. Pet. App. 3a. On February 19, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 25, 1993. The petition was filed on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of conditional pleas of guilty in the United States District Court for the Central District of California, petitioners were convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Jaime Giraldo was sentenced to 25 years' imprisonment and was fined $100,000. C.A. App. 199. Petitioner Luis Giraldo was sentenced to 17 years' imprisonment. C.A. App. 218. The court of appeals affirmed. Pet. App. 1a-2a.

1. On June 24, 1986, a federal indictment was returned charging petitioners and others with a variety of narcotics offenses. On January 28, 1987, petitioners each entered guilty pleas to two counts of the indictment; at that time, defense counsel stated that his clients were willing to waive their speedy trial rights. On September 10, 1987, petitioners withdrew their guilty pleas. Pet. App. 4a; Sept. 10, 1987, Tr. 17-18; Gov't C.A. App. 4 (Sept. 10, 1987, order);[1] see Gov't C.A. Br. 3. For a variety of reasons, the district court did not dispose of the case until May 1990. Because petitioners argue that the delay violated the Speedy Trial Act of 1974, 18 U.S.C. 3161, a detailed summary of the proceedings in the district court is appropriate.

a. At a September 28, 1987, status conference, David Kenner, counsel for petitioner Jaime Giraldo, explained that he was involved at that time in three other trials and two appeals. He requested a continuance of the trial until December 8, 1987, pursuant to

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[1] "Gov't C.A. App." refers to the Supplemental Excerpts of Record the government filed in the court of appeals.

the ends-of-justice provision of the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(B)(iv), which provides for continuances based upon the need for continuity of counsel. The district court granted the continuance, thus excluding all the time between September 28, 1987, and December 8, 1987. Sept. 28, 1987, Tr. 4-5; Gov't C.A. App. 5 (Sept. 28, 1987, order); see Gov't C.A. Br. 5-6.

b. On November 2, 1987, petitioner Luis Giraldo filed a motion for discovery; because 18 U.S.C. 3161(h)(1)(F) excludes any delay attributable to pretrial motions filed by the defendant, filing the motion tolled the speedy trial clock. At a November 30, 1987, status conference, the hearing on the discovery motion was continued by mutual agreement until December 21, 1987; the trial was continued until February 2, 1988. Gov't C.A. App. 6 (Nov. 30, 1987, order), 226 (docket entry 252); Nov. 30, 1987, Tr. 4-5; see Gov't C.A. Br. 6.

c. On December 21, 1987, Kenner failed to appear for the hearing on the discovery motion; counsel for Luis Giraldo explained that Kenner was in South America working on the case. Over the government's objection, the court continued the hearing on the discovery motion until January 4, 1988. At the hearing on January 4, 1988, the district court denied the discovery motion. On the same day, however, Jaime Giraldo filed a motion to dismiss the indictment based on prosecutorial misconduct, and he requested a hearing on that motion. The motion alleged that the police had fabricated evidence included in an affidavit used to support a search warrant. The district court scheduled a February 2, 1988, hearing on the motion to dismiss, stating that a new trial date would be set at that time. Dec. 21, 1987, Tr. 5-8; Jan. 4, 1988,

Tr. 17, 19-21; Gov't C.A. App. 7 (Dec. 21, 1987, order), 8 (Jan. 4, 1988, order), 38-46 (text of motion), 210 (docket entry 259); see Gov't C.A. Br. 6-7.

d. On February 3, 1988, at the request of petitioners' counsel, the hearing on the motion to dismiss was rescheduled for February 17, 1988. On February 10, 1988, the government filed a motion to quash certain subpoenas that had been issued in connection with the motion to dismiss, and to deny an evidentiary hearing on the motion. The district court vacated the February 17, 1988, hearing date and scheduled a February 22, 1988, hearing on the various motions. On the day of the hearing, petitioners filed a memorandum in opposition to the government's motion to quash and to deny an evidentiary hearing.[2] At the hearing, it was agreed that the government would have until March 7, 1988, to reply to the allegations in petitioners' memorandum, and that a hearing on the matter would be held on March 17, 1988. The court subsequently changed the date for the hearing to March 16, 1988, but, for reasons that do not appear on the docket sheet, the March 16, 1988, hearing on the motion was not held.[3] Feb. 22, 1988, Tr. 11-20; Gov't C.A. App. 11 (Feb. 3, 1988, order), 14 (Feb. 22, 1988, order), 15 (Feb. 29, 1988, order), 228 (docket entry 272); see Gov't C.A. Br. 7-8.

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[2] Although the motion to dismiss originally was filed only by Jaime Giraldo, both petitioners joined in the memorandum and subsequent proceedings on the motion. See Gov't C.A. App. 114.

[3] The district court subsequently found that Kenner was involved substantially full time from March 1988 until December 14, 1988, in representing Barry Minkow in complex litigation, which apparently accounts for the failure to hold the motions hearing. Pet. App. 5a.

e. A status conference was held on July 27, 1988, at which the district court scheduled another status conference for August 15, 1988. At the August 15, 1988 conference, which Kenner did not attend for medical reasons, the prosecutor advised the court that the court had not yet disposed of petitioners' motion to dismiss or the government's motion to quash. The court apologized for not having acted on the motions, explaining that it believed that it had dealt with all outstanding motions. Counsel for Luis Giraldo advised the court that Kenner was involved in a trial that was anticipated to last about two months as well as another trial scheduled to start after that one. The district court then set the case for trial on October 18, 1988, but failed to set another hearing date for the motion to dismiss. Gov't C.A. App. 16 (July 27, 1988, order), 17 (Aug. 15, 1988, order); Aug. 15, 1988, Tr. 4-9; see Gov't C.A. Br. 8-9.

f. For reasons that again are not reflected on the docket sheet, trial did not commence on October 18. The docket sheet shows only that on December 8, 1988, the district court, pursuant to a stipulation entered into by both parties, continued the trial until February 28, 1989.[4] Gov't C.A. App. 18-20 (Dec. 8, 1988, order and stipulation), 212 (docket entries 284, 285), 229 (same).

g. On February 28, 1989, Kenner proposed to waive jury trial and to try the case principally by stipulation. He also requested a continuance of the trial until April 11, 1989. The prosecutor stated that the principal reason for the delay was Kenner's

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[4] As with the failure to hold the March 16, 1988, hearing, see note 3, *supra*, the reason for the continuance appears to be that Kenner was occupied with other matters. See Pet. App. 5a.

unavailability due to other trial commitments, but he voiced concerns about the Speedy Trial Act. The court stated that it "[did not have] the slightest doubt that there is no Speedy Trial Act problem in this case," and ordered Kenner to prepare a speedy trial order; Kenner did not prepare such an order. Feb. 28, 1989, Tr. 4-6; Gov't C.A. App. 21 (Feb. 28, 1989, order). In response to another stipulation by petitioners, the court on April 7, 1989, entered an order continuing the trial date until May 16, 1989, for "[g]ood cause * * * shown." Gov't C.A. App. 22-24 (Apr. 7, 1989, order and stipulation); see Gov't C.A. Br. 10.

h. On August 4, 1989, the government filed a motion requesting a status conference and the setting of a trial date. At a September 11 status conference, the district court set the trial for November 14, 1989, in order to accommodate the schedule of Kenner, who was on the eve of trial in a complex narcotics conspiracy case (the *Villabona* case), Gov't C.A. App. 25-28 (motion for status conference and trial date), 31 (Sept. 11, 1989, order); Sept. 11, 1989, Tr. 4, 6; see Gov't C.A. Br. 10.

i. At a November 3, 1989, status conference, Kenner reported that the *Villabona* case, in which both he and counsel for Luis Giraldo were involved, was still at the pretrial motions stage, and requested a continuance of the trial in this case until March 13, 1990. The court, although noting the prosecutor's dismay at the continuances, agreed to that date and scheduled a February 12, 1990, status conference to determine the progress of the *Villabona* case. The court advised Kenner that "[u]nder no circumstances" was he to take another engagement after the *Villabona* case. The court further ordered defense counsel for petitioner Luis Giraldo to draft

a speedy trial order; counsel did not do so. Nov. 3, 1989, Tr. 4-9; Gov't C.A. App. 33 (Nov. 3, 1989, order); see Gov't C.A. Br. 10-11.

j. At the status conference (which took place on February 14, 1990), Kenner advised the court that the *Villabona* trial probably would conclude between the middle and end of April 1990. Over the prosecutor's complaints that the trial had dragged on for an "ungodly long time," the court set trial for May 15, and scheduled an April 17, 1990, status conference. Feb. 14, 1990, Tr. 4-8; Gov't C.A. App. 34 (Feb. 14, 1990, order); see Gov't C.A. Br. 11.

k. At the April 17, 1990, status conference, counsel for Luis Giraldo advised the court that Kenner was still in trial in the *Villabona* case, which was expected to conclude in early May. The prosecutor observed that it appeared petitioners were seeking to set up a speedy trial issue for appeal, although they had at every point acquiesced in the successive delays of the case caused by Kenner's particularly crowded calendar. The district court replied that " '[a]cquiesce' is too mild a word," that such a claim would be "ludicrous" and "outrageous," and that if defense counsel "could stand up at that lectern and argue that with a straight face, I'd have to call the paramedics for myself." The court confirmed the trial date of May 15, 1990. Gov't C.A. App. 35 (Apr. 17, 1990, order); Apr. 17, 1990, Tr. 6-7. Trial did not commence on May 15 because Kenner still was involved in the *Villabona* trial. See Gov't C.A. Br. 12.

2. Petitioners, through different counsel, then filed a motion to dismiss the indictment with prejudice for lack of a speedy trial.

a. The district court held a May 21, 1990, hearing, at which it indicated it would deny the motion.

May 21, 1990, Tr. 29. The court explained that defense counsel had been responsible for virtually all the continuances that had been granted, and that "almost all of those continuances were greeted by utter outrage" from the prosecutor. *Id.* at 21. The court noted that petitioners had never informed the court that they wanted another lawyer who could bring the case to trial in a hurry, but rather had acquiesced in the continuances. *Id.* at 14, 18. The prosecutor also argued that the speedy trial clock had been tolled because the court had not conducted a hearing or ruled on petitioners' motion to dismiss or the government's motion to quash. The district judge observed that his personal recollection was that all motions had been ruled on. *Id.* at 10-11, 25-27. Petitioners then filed conditional guilty pleas, reserving their right to raise the speedy trial claim on appeal. *Id.* at 42-50.

b. The district court subsequently memorialized its ruling in a written order. Pet. App. 4a-6a. That order concluded that the motion to dismiss should be denied because the entire period from September 10, 1987, to May 22, 1990, was excludable both because of the outstanding pretrial motions and because of the involvement of petitioners' attorneys in other cases.

On the first point, the court stated that a discovery motion filed by the defense was pending from August 12, 1987,[5] until January 4, 1988, Pet. App. 4a, and that a motion to dismiss the indictment for

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[5] The reference to August 12, 1987, apparently was an error; the correct date was November 2, 1987. See Gov't C.A. App. 226 (docket entry 252, noting filing of discovery motion by Luis Giraldo).

prosecutorial misconduct, filed on the day the earlier motion was dismissed, remained pending in May 1990, *id.* at 4a-5a. Accordingly, that period of time was excludable under 18 U.S.C. 3161(h)(1)(F).

On the second point, the court explained that counsel for petitioner Jaime Giraldo was involved in other cases continuously from March 1988 to May 1990. The court stated that

> it would not have been reasonable for the court to have required [petitioners] to proceed to trial because their cases were joined for trial and counsel for Jaime Giraldo has been continuously engaged in representing clients in a way which did not permit him to effectively prepare for trial, taking into account the exercise of due diligence. * * * The ends of justice served by the granting of successive continuances during the period of September 10, 1987 to May 22, 1990 outweig[h] the interests of the public and [petitioners] in a speedy trial. That finding of good cause is based upon the need for continuity of counsel and the fact that the case, while not unusually complex, nevertheless requires a sufficient period for counsel to prepare for trial, and denial of that time for preparation would be likely to produce a miscarriage of justice.

Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-2a. The court explained that

> [t]he record shows that the delays [petitioners] allege to be nonexcludable were caused primarily by defense counsel's numerous requests for continuances. * * * The remaining delay was due to then pending pretrial motions. * * *

> In short, the overwhelming cause of the delay in this case was [petitioners] themselves. We therefore likewise conclude that [petitioners'] * * * statutory righ[t] to speedy trial w[as] not violated.

Id. at 2a.

ARGUMENT

The Speedy Trial Act of 1974 generally requires that trial commence within 70 days of indictment. 18 U.S.C. 3161(c)(1). That 70-day period, however, is subject to expansion by periods of excludable delay. See *Henderson* v. *United States*, 476 U.S. 321, 326 (1986). In this case, the district court excluded delay attributable to petitioners' motions for continuances under 18 U.S.C. 3161(h)(8)(B)(iv) and to the pendency of pretrial motions under 18 U.S.C. 3161(h)(1)(F). Petitioners contend that exclusion of the delay was not proper under either provision. First, they argue (Pet. 7-18) that exclusion was improper under Section 3161(h)(8)(B)(iv) because the district court did not make specific findings, before granting the continuances, that the "ends of justice" warranted those continuances; instead, petitioners argue, the court provided only retroactive justification for the delays. Second, petitioners argue (Pet. 18-20) that exclusion of the entire period (November 2, 1987, to May 21, 1990) during which pretrial motions were pending was improper because the maximum amount of excludable delay attributable to motions for which hearings are not required is 30 days from the date of the last submission. We disagree and believe that the court of appeals properly concluded that petitioners' speedy trial rights were not violated.

1. Section 3161(h)(8)(A) excludes "[a]ny period of delay resulting from a continuance granted

by any judge * * * at the request of the defendant * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The period of the continuance will not be excluded unless "the court sets forth, in the record of the case, either orally or in writing, its reasons." *Ibid.* In this case, the district court plainly satisfied that record-keeping requirement. In denying petitioners' motion for dismissal for speedy trial violations, the district court explained in writing that defense counsel for petitioner Jaime Giraldo was continuously engaged in representing other clients during the period from September 10, 1987,[6] to May 21, 1990, and could not, with due diligence, effectively prepare for trial. The district court found that the "ends of justice served by the granting of successive continuances during [that period] outweig[h] the interest of the public and [petitioners] in a speedy trial." Pet. App. 6a. The district court specifically based its finding of good cause on the need for "continuity of counsel" and its conclusion that denying defense counsel adequate "time for preparation would be likely to produce a miscarriage of justice." *Ibid.*

Petitioners argue (Pet. 7-18) that those findings were insufficient because they were not made at the time the district court granted the continuances in question. But the courts of appeals uniformly

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[6] Petiitoners acknowledge (Pet. 3 n.2) that, for purposes of their appeal, the speedy trial "clock" began to run on September 10, 1987, when the district court granted their motion to withdraw their previously entered guilty pleas. See 18 U.S.C. 3161(c)(1).

have held that a district court need not set forth the precise reasons for its decision at the time a continuance is granted; it is permissible for the court to issue its explanation later. *United States* v. *Rush*, 738 F.2d 497, 507 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *United States* v. *Lattany*, 982 F.2d 866, 877-878 (3d Cir. 1992), petition for cert. pending, No. 92-8187; *United States* v. *Carey*, 746 F.2d 228, 230 n.2 (4th Cir. 1984), cert. denied, 470 U.S. 1029 (1985); *United States* v. *Crawford*, 982 F.2d 199, 204 (6th Cir. 1993); *United States* v. *Tanner*, 941 F.2d 574, 583 (7th Cir. 1991), cert. denied, 112 S. Ct. 1190 (1992); *United States* v. *Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981); *United States* v. *Bryant*, 726 F.2d 510, 511 (9th Cir. 1984); *United States* v. *Doran*, 882 F.2d 1511, 1516 (10th Cir. 1989); *United States* v. *Vasser*, 916 F.2d 624, 626-627 (11th Cir. 1990), cert. denied, 111 S. Ct. 1688 (1991); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980).

Petitioners correctly note (Pet. 11 & n.14) that the Act does not permit a district court to provide an after-the-fact justification for unauthorized delays by granting a retroactive ends-of-justice continuance. Rather, the court must consider the applicable factors at the time it grants the continuance, and the findings on which the court ultimately relies must be the factors that in fact motivated the court's decision to grant the continuance. See, *e.g.*, *Lattany*, 982 F.2d at 877; *Crawford*, 982 F.2d at 204-205; *Tanner*, 941 F.2d at 583; *Vasser*, 916 F.2d at 626; *Doran*, 882 F.2d at 1516; *Carey*, 746 F.2d at 230.

The record in this case, viewed in its entirety, supports the court of appeals' finding that virtually the entire delay in bringing this case to trial was caused by defense counsel's numerous requests for continuances—necessitated by his extensive involvement in other cases, to the exclusion of his ability to address this case—and that the district court properly granted ends-of-justice continuances in order to allow for continuity of counsel. To be sure, the district court did not make explicit "ends-of-justice" findings at the time it granted each of the continuances. But on September 28, 1987—at the time the district court granted the first continuance based on defense counsel's conflicting schedule—the court agreed to defer the trial only after it accepted defense counsel's argument that it should grant a continuance under the "continuity of counsel" clause of the ends-of-justice exception in 18 U.S.C. 3161(h)(8)(B)(iv). Sept. 28, 1987, Tr. 4-5. As the district court's opinion makes clear (Pet. App. 5a-6a), the district court's subsequent grants of continuances based on defense counsel's continued involvement in other cases rested on the implicit finding that continued accommodation of defense counsel's schedule would serve the ends of justice. None of the cases on which petitioners rely has found error in such a situation, where a court, contemporaneously with its decision to grant an initial continuance, sets forth on the record a valid basis for granting that continuance, and then implicitly relies on that same basis in granting subsequent continuances.

Petitioners correctly observe (Pet. 14-16) that the courts of appeals have taken different approaches as to the type of record that must be made at the time

an ends-of-justice continuance is granted. A few courts of appeals require the district court to indicate specifically at the time it grants the continuance that it is doing so based upon a balancing of the factors specified by Section 3161(h)(8). See *United States* v. *Brenna*, 878 F.2d 117, 122 (3d Cir. 1989); *United States* v. *Tunnessen*, 763 F.2d 74, 78 (2d Cir. 1985).[7] Most of the courts of appeals, however, do not insist on an explicit reference to the Speedy Trial Act at the time of the continuance, but instead require only that it be clear from the record that the court in fact considered the factors identified by the statute at the time it granted the continuance. See, *e.g.*, *Rush*, 738 F.2d at 507 (1st Cir.); *Carey*, 746 F.2d at 230 n.2 (4th Cir.); *United States* v. *Crane*, 776 F.2d 600, 606-607 (6th Cir. 1985); *Doran*, 882 F.2d at 1516

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[7] Petitioners err in indicating (Pet. 15) that the Eighth Circuit and the Tenth Circuit also have adopted that rule. First, they state that the blocked quotation from *Tunnessen* appearing on page 15 of the petition is in turn a quotation from *United States* v. *Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981). Although the *Tunnesen* panel did quote from the *Clifford* opinion on page 79 of its opinion, none of the material reproduced on page 15 of the petition appears in *Clifford*. Second, petitioner cites *United States* v. *Lewis*, 759 F.2d 1316, 1351-1352 (8th Cir.), cert. denied, 474 U.S. 994 (1985). That opinion, however, rejected a challenge in a case in which a record was made contemporaneously. It did not offer any guidance as to how it would treat a case in which the court did not contemporaneously refer on the record to the Speedy Trial Act. Finally, petitioners err in relying on the Tenth Circuit's decision in *United States* v. *Doran*, 882 F.2d 1511 (1989). As is evident from the petition's subsequent citation of that decision for the contrary proposition (Pet. 16), *Doran* in fact adopted the rule urged by the government, under which a continuance is adequate if the record as a whole indicates that it was based on suitable reasons.

(10th Cir.); *Vasser*, 916 F.2d at 626-627 (11th Cir.); *Edwards*, 627 F.2d at 461 (D.C. Cir.).

Although it is possible that the courts requiring a contemporaneous reference to the Speedy Trial Act would have overturned the judgment of the district court in this case—because the district court did not refer to the Speedy Trial Act specifically each time it continued the trial date—it also is possible that they would have found that the clear contemporaneous record the court made when it granted the first continuance was sufficient explanation for all of the subsequent continuances. In any event, there is no compelling need for a uniform standard for all circuits governing the requisite timing and explicitness of a district court's ends-of-justice findings. Such a standard does not directly affect the substantial rights of a defendant, but instead is a housekeeping standard that only balances the need for a trial court to have discretion over how it explains its decisions against the need for a reviewing court to have a record that clearly and accurately reflects the basis for the trial court's decisions. On such a question, there is no need for this Court to intervene to require precise uniformity in the manner in which courts of appeals regulate district court practice within their respective circuits.

Even if it were important to have a uniform rule on the question, this case would not be a suitable vehicle for considering the question, because petitioners' speedy trial claims would not succeed even if the Court adopted the uniform standard sought by petitioners. First, as discussed below, even if the time in question were not excluded by the "ends-of-justice" exception, it was proper to exclude it because of the

pendency of pretrial motions filed by petitioners. Second, in our view the conduct of petitioners' counsel in this case was sufficient to waive petitioners' rights under the Act. Because the Act was passed "not only for the benefit of criminal defendants, but also out of concern for the interest of the public in seeing that justice is done without great delay," courts have not lightly found that defendants have waived their rights under the Act. *United States* v. *Kucik*, 909 F.2d 206, 210 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991). In egregious situations, however, courts have been unwilling to require dismissal of an indictment on the basis of delay caused by the defendant, even if the delay was not excludable under any particular provision of the Act.[8]

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[8] See *United States* v. *Noone*, 913 F.2d 20, 28 (1st Cir. 1990) ("[T]he Speedy Trial Act allows for the exclusion of delays occasioned by a defendant's unnecessary prolongation of the proceedings."), cert. denied, 111 S. Ct. 1686 (1991); *United States* v. *Pringle*, 751 F.2d 419, 434 (1st Cir. 1984) (a defendant may not "use the waiver-induced leisurely pace of the case as grounds for dismissal"), vacated on other grounds *sub nom. United States* v. *McAfee*, 479 U.S. 805 (1986); *United States* v. *Eakes*, 783 F.2d 499, 504 (5th Cir.) (refusing to order dismissal where the defendant had obtained a continuance for an invalid reason), cert. denied, 477 U.S. 906 (1986); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987) (excluding delay occasioned by the need to reschedule an arraignment due to the failure of the defendant and defense counsel to appear at a previously scheduled arraignment); *Kucik*, 909 F.2d at 211 ("a defendant [who] actively participates in a continuance covering a discrete period of time * * * cannot then 'sand-bag' the court and the government by counting that time in a speedy trial motion"); see also *United States* v. *Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989) ("defendants ought not to be able to claim relief on the basis of delays which they themselves deliberately caused").

Because petitioners' counsel was directly responsible for almost all the delay in this case, it would not be appropriate to reward petitioners by dismissing the indictment.

2. The period from November 2, 1987, to May 21, 1990, also was excludable because of the pendency of pretrial motions.[9] Section 3161(h)(1)(F) excludes from statutory speedy trial calculations "[a]ny period of delay * * * resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." The provision broadly applies to all pretrial motions, whether or not they actually cause a postponement of trial. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (exclusion is automatic).

On November 2, 1987, Luis Giraldo filed a motion for discovery. The hearing on that motion was scheduled for December 21, 1987; when counsel for Jaime Giraldo failed to appear on that date, the hearing on the discovery motion was continued until January 4, 1988, at which time the district court denied the motion. Accordingly, the period from November 2,

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[9] Although there apparently was no motion pending during the first portion of the period challenged by petitioners (from September 10, 1987, to November 2, 1987), see note 4, *supra*, the pendency of the motions nevertheless constitutes an adequate basis for affirmance of the judgment. That is so because the September 28, 1987, continuance of the trial to December 8, 1987, apparently was adequate even under petitioners' view of the law; in a finding made at the time of that continuance the court indicated that Luis Giraldo's need for continuity of counsel was sufficiently serious that the ends of justice required a continuance, Sept. 28, 1987, Tr. 4-5. Given the adequacy of that continuance, the only time period realistically in dispute is the period from December 8, 1987, to May 21, 1990.

1987, to January 4, 1988, was excludable based on that motion.[10]

That same day, Jaime Giraldo filed a motion to dismiss based on prosecutorial misconduct. On February 10, 1988, the government filed a motion to quash certain subpoenas that had been issued in connection with the dismissal motion. At the time of the May 21, 1990, hearing on the motion to dismiss for speedy trial violations, the court (albeit through its own oversight and the oversight of both parties), had neither conducted a hearing on those two motions nor ruled on them. Accordingly, the entire period of time from November 2, 1987, to May 21, 1990, constituted excludable delay under the Act. See *Henderson* v. *United States*, 476 U.S. 321, 330 (1986) (the entire period between the filing of a motion and a hearing on the motion is excluded under the Act whether or not a delay in holding that hearing is "reasonably necessary").

Relying on *Henderson*, petitioners argue (Pet. 19-20) that because a hearing was not required on their motion to dismiss, the period of time excludable under the pretrial motions exception in the Act terminated 30 days from the date of the last submission by either party, which in this case was March 7, 1988 (when the government filed its final brief in connection with the motions). See *Henderson*, 476 U.S. at 331 (for motions decided on the papers without a hearing, the subsection (h)(1)(F) exclusion normally ends when all of the papers pertaining to the motion are filed with the court). In this case, however, *Henderson* is inapplicable because the dis-

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[10] Petitioners do not contest the portion of the delay attributable to the discovery motion. See Pet. 18-20.

trict court contemplated that a hearing would be necessary to resolve the motion to dismiss for prosecutorial misconduct.

Petitioners correctly note (Pet. 20) that the government attempted to have the motion dismissed without a hearing; on February 10, 1988, the government filed a motion to quash the subpoenas that had issued in connection with the motion and to deny an evidentiary hearing on the motion to dismiss, arguing that an evidentiary hearing was unnecessary because the motion contained no factual statements supporting the claim. Gov't C.A. App. 79-87. But on February 22, 1988—the date scheduled for the hearing on the motion to dismiss—petitioners filed a memorandum setting forth a factual basis for the claim of government misconduct (supported by the declaration of Adiela Bustamante Solorzana). *Id.* at 107-120. Petitioners urged in the memorandum that Solorzana's declaration demonstrated a basis for requiring a full evidentiary hearing. *Id.* at 108, 112, 113-114. At a status conference conducted that same day, the district court continued the hearing on the motion in order to allow the government an opportunity to investigate and respond to the allegations in the defense memorandum. The court stated its view that the declaration made "very serious allegations" about the police officers involved in the case, Feb. 22, 1988, Tr. 5; that it could not at that time resolve the charges, which would require "some sort of a confrontation between the [officers charged with wrongdoing] and Solorzan[a, who was then in Colombia]," *id.* at 5-6; [11] and that Solorzana should

[11] The court's concern about the allegations was conveyed with considerable emphasis; among other things, the court

be brought to the United States to testify concerning the charges, *id.* at 6-7. The court then gave the government two weeks within which to respond to the charges raised in the memorandum and scheduled a hearing on the matter for March 16, 1988. *Id.* at 20; Gov't C.A. App. 15. For reasons undisclosed in the record, however, the hearing did not take place at that time and the district court thus did not rule on the motion to dismiss at that time.[12] Hence, because the court contemplated conducting a hearing on the motion to dismiss, and in fact scheduled such a hearing, the motion was not submitted before May 21, 1990 (when petitioners again agreed to plead guilty). Thus, the entire period of time from the filing of the motion until May 21, 1990, was excludable under the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

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cautioned the prosecutor that he "should tell those [police] officers that were they ever to be caught not telling the truth about this, they're dead meat." Feb. 22, 1988, Tr. 11-12.

[12] As stated in note 3, *supra*, the hearing apparently was not held because of the schedule of Jaime Giraldo's counsel.

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v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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ARGUMENT

1. The government concedes the lack of "a uniform standard for all circuits governing the requisite timing and explicitness of a district court's ends-of-justice findings," Brief for the United States in Opposition ["Opp. Br."] 15, yet attempts to trivialize this conflict in the circuits as a mere "housekeeping" matter that "does not directly affect the substantial rights of a defendant." Opp. Br. 15. The government itself admits, however, that petitioners' speedy trial motion might well have been granted and their convictions *reversed* in the circuits that follow a stricter standard governing the "requisite timing and explicitness" of the ends-of-justice findings than did the Ninth Circuit in this case. Opp. Br. 15.

We respectfully submit that substantial rights certainly are at stake in the resolution of a conflict in the circuits regarding the construction of a federal criminal statute that results in freedom for some and incarceration for others who are similarly situated. The resolution of precisely such a conflict in the lower courts is this Court's ultimate responsibility. *See* Rules of the Supreme Court 10.1(a), (c).

2. The proper standard governing the ends-of-justice finding is dictated, not by the varying preferences of the courts of appeals, but by the express language of the Speedy Trial Act. *See, e.g., Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 117 L.Ed. 2d 391, 397 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The statute forbids the exclusion of delay resulting from a continuance granted by the district court unless "the judge granted such continuance on the basis of his finding that the ends of justice served by taking such action outweigh the best interests of the public and the defendants in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Congress thus plainly dictated that there would be a separate ends-of-justice finding supporting *each* continuance and that such findings would *precede* the continuances. In this case, the Ninth Circuit, with the government's endorsement, dispensed with both of those dictates, in conflict with all other circuits.

The Act secondly requires that "the court set[ ] forth, in the record of the case, either orally or in writing, its reasons for" the ends-of-justice finding. 18 U.S.C. § 3161(h)(8)(A). That provision most naturally is read to require the district court to record its ends-of-justice findings at the time it makes the findings themselves. Yet that natural reading of the text is rejected by the government and many (but not all) of the courts of appeals, including the Ninth Circuit. *See* Petition for Certiorari ("Petition") 14.

As the government points out, some of the courts of appeals have construed this second provision to permit the granting of a continuance before the making of a record of the ends-of-justice finding, as long as the court at least makes a contemporaneous statement on the record that the continuance is pursuant to the ends-of-justice exclusion under the Act. By affirming a retroactive, conclusory ends-of-justice finding even in the *absence* of such contemporaneous statements, however, the Ninth Circuit, with the government's blessing, went far beyond any prior court of appeals decision and wholly obliterated the statute's protection against the *post hoc* rationalization of delay.[1]

3. The government disingenuously suggests that retroactive ends-of-justice findings are not inconsistent with the Act as long as they reflect "implicit" findings made at the time the continuance is granted.[2] The government fails to explain how an appellate court can engage in the mind-reading necessary to discern an "implicit" finding. In truth, appellate reliance on an artifice such as "implicit" ends-of-justice findings would constitute an unjustifiable circumvention of the statute's plain requirements.

4. The government's contention that petitioners "waived" their Speedy Trial rights is equally disingenuous.

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[1] The government's brief focuses heavily on the corollary question (on which the circuits again divide) whether the district court must expressly invoke the language of the Speedy Trial Act in making the required contemporaneous statement regarding the ends of justice. Such a requirement certainly is a salutary safeguard against abuse of an exclusion that Congress intended to be of limited application, but it by no means is a sufficient check.

[2] Opp. Br. 13. The sole basis for the government's assertion that the court made such "implicit" findings in this case is a single passing reference to the Act by the district court at the time of the first continuance. *Id.* at 13. The government cannot seriously maintain that such a remark satisfies the Act's requirement of a contemporaneous finding accompanying *each* continuance granted thereafter — particularly with respect to the numerous continuances that occurred simply by default. *See* Petition 3-4.

Congress made clear that those rights are not waivable, and no court has held otherwise.[3] Nor, contrary to the government's contention, does this case present "egregious" facts warranting the acceptance of an unprecedented waiver doctrine. Opp. Br. 16. While some continuances certainly occurred because of defense counsel's conflicting trial schedule, the government does not dispute that many others — totalling over 19 months — resulted solely from neglect of the case by the district court and prosecutor.[4] During that time, trial dates came and went with no indication on the record that the district court was even conscious of them. The government also does not dispute the prejudice to petitioners resulting from these delays. *See* Petition 12. This Court should make clear to the lower courts that such prejudicial delay cannot be swept under the rug by conjuring up

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[3] *See* Petition 12 & n.16. The cases cited by the government at Opp. Br. 16 n.8 provide no support for its position. None accepts a waiver doctrine; indeed, all confirm the *nonwaivability* of Speedy Trial Act rights. Several of the cases (*Pringle*, *Eakes*, *Bowers*, and *Kucik*) hold that, while not legally effective, an attempted prospective waiver of Speedy Trial limits or a stipulation by the parties to exclude subsequent delay for Speedy Trial purposes may result in the legitimate exclusion of delay resulting from the parties' mistaken assumption of the effectiveness of such actions. The *Kington* case questions even that type of exclusion, but in any event, no such facts obtain in this case. *Noone* did not involve a waiver issue, but rather the exclusion of delay resulting from the defendant's own procrastination in obtaining counsel, a circumstance again not presented here.

[4] The government's lengthy recitation of the facts only confirms the two periods of inactivity and four default continuances discussed at Petition 3-4. The government does not dispute that at least one continuance (November 30, 1987) was requested by the *government* for its convenience. Even as to the continuances requested by defense counsel, the government's waiver argument relies on the unwarranted assumption made by the district court, without conducting any inquiry, that petitioners — two non-English speaking accuseds — understood their Speedy Trial Act rights and deliberately chose not to press for a trial.

"implicit" ends-of-justice findings or invoking a spurious waiver doctrine. [5]

Respectfully submitted,

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[5] Equally spurious is the suggestion that the Speedy Trial Act clock was tolled by the alleged pendency of a motion *of which the court itself was not even aware*. Opp. Br. 5. Contrary to the government's assertion, the district court did *not* decide that an evidentiary hearing on petitioners' prosecutorial misconduct motion was warranted. The record shows only that, after the government filed its response opposing such a hearing, the court did *not* schedule one. (The March 16, 1989 date to which the government refers, Opp. Br. 4, was merely a "date for appearing," *i.e.*, a status call. Tr. Feb. 22, 1988, at 19.) Nor is the government correct in its suggestion that a hearing on the motion was deferred because of the *Minkow* case. Opp. Br. 4-5 & nn. 3-4. The *Minkow* trial did not commence until six months later, in late August 1989. *See* Reply Brief of Defendants-Appellants, *United States v. Giraldo*, Nos. 90-50415, 90-50420, Appendix A, at A-5 (docket sheet in *Minkow*). The district court's retroactive finding on this point was clearly error — an error easy to make when attempting retroactively to justify lengthy delays with a single determination of excludability.